The Outsourcing of Discrimination: Another SCOTUS Earthquake?

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Introduction

The First Amendment prohibits laws "respecting an establishment of religion, or prohibiting the free exercise thereof." These two religion clauses have long existed in tension and in a balance.[1] The Free Exercise Clause protects individuals' right to practice their religion as they please, while the Establishment Clause keeps the government from (at least in some circumstances) favoring or disfavoring religion or religious institutions. But that balance has perished. A well-orchestrated push to lift the Amendment's Free Exercise Clause above its Establishment Clause has seen a level of success enjoyed by few other legal-advocacy efforts.[2]

Yet, now that the dog has caught the car, the consequences may be unexpected and severe. As explained in this policy memo, the Supreme Court is just a few small steps away from transforming every charter school law in the U.S. into a private-school voucher policy. Further, the nation may be facing a future of religious organizations proselytizing through charter schools that have been freed from obeying anti-discrimination laws—with LGBTQ+ community members being the most likely victims.

To understand how we have approached this precipice, consider some fundamental shifts within the past 60 years of Supreme Court jurisprudence. The Establishment Clause saw its heyday in the 1960s and 1970s, with the Supreme Court drawing on the "wall of separation between church and State" language in *Reynolds v. United States* (1878)[3] and then setting forth a restrictive three-part test in *Lemon v. Kurtzman* (1971).[4] In the 1980s and 1990s, the Burger and Rehnquist Courts chipped away at the *Lemon* test.[5] Several of the justices on the Roberts Court now openly reject *Lemon* or call for it to be overruled[6] while elevating the power and scope of the Free Exercise Clause.[7]

The real-world implications of this jurisprudential shift have been enormous, with private-school voucher policies among the most prominent beneficiaries. As I explained in a

Washington Post article the day that the Court handed down its decision in *Espinoza v. Montana Department of Revenue* (2020):[8]

> [T]he *Espinoza* decision was itself decades in the making. The legal landscape for vouchers supporting private religious schools has changed 180 degrees, corresponding to the shift in the makeup of justices on the Supreme Court. Vouchers for religious schools have moved from being broadly understood to be constitutionally forbidden in 1970s to constitutionally allowed in 2003, via the *Zelman [v. Simmons-Harris* (2002)] decision, to now arguably constitutionally required, at least under the Montana circumstances.[9]

This policy memo examines these and other relevant decisions, as well as the potential impact of the *Carson v. Makin* case,[10] which is currently before the Court, with a decision expected to be handed down in the next three to six weeks. The political and policy implications of the cases' holdings and rationales are also discussed. Specifically, I argue that state policymakers may be forced to confront what I call the *outsourcing of discrimination*—a core implication of the Free Exercise legal straitjacket that the Court is now designing for every state to wear. In a nutshell, the majority of Supreme Court justices may adopt a rule requiring that whenever a state decides to provide a service through a non-state employee (e.g., through a contracting mechanism), the state will face the highest level of judicial scrutiny if it discriminates against churches and church-affiliated service providers that infuse their beliefs into the provided services. Moreover, the Court may determine—in *Carson* or a subsequent case—that it will apply that same heightened scrutiny to any state intervention if those beliefs drive those providers to engage in discrimination against people because of, for example, their gender identity or sexual orientation (as we see with the private, religious schools at issue in the *Carson* litigation).[11]

For states that are politically inclined to engage in such discrimination themselves, this outsourcing of discrimination may be an attractive approach. But states that abhor such discrimination may find themselves forced to pull back on private contracting to provide public services, ending policies that allow private operators of everything from social services like foster care to health care to prisons and, as I explain below, charter schools.

Free (and Aggrandized) Exercise

The legal advocacy campaign for more muscular free exercise jurisprudence is grounded in a two-part rationale. First, any restriction on worship or on state support for churches that is not required by the Establishment Clause should be considered an act of discrimination based on religious belief. Second, the Establishment Clause should be interpreted as requiring very few restrictions on governmental support for religious institutions or worshipers.

Although this advocacy effort has been largely successful since the 1980s, the 2004 *Locke v. Davey* decision was a setback for the Free Exercise advocates. The Court in that case upheld a Washington law that denied state-funded scholarships to students pursuing degrees in "devotional theology." The Court noted that while the Establishment Clause does not prohibit the state from granting a scholarship to these students, the Free Exercise Clause does

not demand it. There is, the Court ruled, "play in the joints" between what the Establishment Clause permits and what the Free Exercise Clause compels.[12]

The *Locke v.* Davey setback was, however, short-lived. In 2020, the *Espinoza* decision greatly narrowed the *Locke* holding concerning the "play in the joints" between the religion clauses. The *Espinoza* majority found a free-exercise violation in the application of the "no aid" clause in Montana's state constitution to prevent religious schools from participating under a neo-voucher[13] law that used tax credits to create a funding mechanism for small vouchers (about $500 each) to help pay for private school tuition. Because the Montana state constitution's no-aid clause prohibits direct or indirect state support for church-controlled schools, the Montana Department of Revenue only allowed the law to go forward on the condition that religious schools be excluded. A lawsuit, *Espinoza v. Montana Department of Revenue*, challenged that ruling and made its way to that state's supreme court, which struck down the entire neo-voucher law, thus avoiding the possibility of anti-religious discrimination whereby religious entities would be treated differently than secular ones, while also avoiding a violation of the Montana constitution. That did not settle the matter. The U.S. Supreme Court decided to weigh in, finding anti-religious discrimination in the decisions along the way that applied the no-aid clause. In particular, the Court drew a distinction between discrimination based solely on an institution or individual's religious "status" (subject to strict scrutiny) and discrimination based on religious "use" (possibly subject to a lower level of scrutiny, as part of the play in the joints):

> *Locke* differs from this case in two critical ways. First, *Locke* explained that Washington had "merely chosen not to fund a distinct category of instruction": the "essentially religious endeavor" of training a minister "to lead a congregation." Thus, Davey "was denied a scholarship because of what he proposed to do – use the funds to prepare for the ministry." Apart from that narrow restriction, Washington's program allowed scholarships to be used at "pervasively religious schools" that incorporated religious instruction throughout their classes.
>
> By contrast, Montana's constitution does not zero in on any particular "essentially religious" course of instruction at a religious school. Rather, as we have explained, the no-aid provision bars all aid to a religious school "simply because of what it is," putting the school to a choice between being religious or receiving government benefits.
>
> At the same time, the provision puts families to a choice between sending their children to a religious school or receiving such benefits.[14]

The forthcoming 2022 decision in *Carson*, the Maine "tuitioning" case, will likely set forth a rigid rule that would likely limit or invalidate laws that prohibit the use of public money for the religious purposes of inculcation and proselytization. The Maine law allows those students in school administrative units (which are somewhat akin to school districts) that have no available public secondary school to attend the public or approved private school of their choice at public expense. While bringing some private schools within the public system, the state also places some limits on the schools students may attend, including the requirement that the private school attended must be nonsectarian. While the private school can be

run by a religious organization, the education provided must be religiously neutral, without teaching through the lens of any particular faith and without proselytizing or inculcating children with a religious faith. While Maine acknowledges that current U.S. Supreme Court rulings would allow public funding for students to choose to attend sectarian schools, the state argues that this is against the purposes of the policy designed only to allow for private schools to opt into providing an education within the public system and existing rules.

Justices Thomas, Alito, and Gorsuch have already indicated that they would dispose of the distinction, described in *Espinoza*, between prohibiting religious use of public money and prohibiting the distribution of public money to support religious people or institutions. For them, either limitation amounts to anti-religious discrimination and should be subject to the strict-scrutiny standard of judicial review. If Justices Barrett and Kavanaugh (perhaps joined by Chief Justice Roberts) decide in *Carson* to remove the distinction, then the Free Exercise Clause would essentially require that taxpayer money be made available for religious uses whenever it is made available at all (absent a compelling governmental interest and the narrow tailoring of the law to achieve that interest).

In the context of education, this would mean that when a public educational service is contracted out to private operators—potentially including via charter schools, but certainly including voucher-receiving private schools—the contracts would likely have to be available to religious entities and be available for religious uses.

Charter Schools and the "State Actor" Doctrine

Consider again the key implication of the *Carson* ruling contemplated here: States would be engaging in discrimination if they did to allow a church or religious entity to operate a publicly funded charter school as a religious school. This may seem counterintuitive, since the Supreme Court has a long and largely unquestioned body of decisions that apply the Establishment Clause to prohibit public schools from engaging in proselytizing or otherwise promoting or endorsing religious beliefs.[15] But *Zelman* (2002)[16] and its progeny create a major exception: Publicly supported education in private religious schools does not violate the Establishment Clause if the decision to enroll the student—and therefore to direct the public money to the private school—is made privately by parents and students. (The Court in *Zelman* also focused on several other elements of the Cleveland voucher system, but it is unclear which if any of those other factors the current set of Justices would find important.)

The key public-private difference that the Court elevated in *Zelman* hinges on whether the promotion or endorsement of religion is a state action.[17] In most past Establishment Clause cases, the state action was indisputable: Public employees acting within public schools. The *Zelman* Court, in contrast, found that the Cleveland voucher policy largely separated the state from the decisions that resulted in any advancement of religious teachings. Private (non-state-actor) parents chose the private schools, and the teaching within the private schools was, of course, carried out by privately employed teachers directed by private (religious) leaders.

This "state actor" doctrine is the subject of several recent articles considering the possibility

that the Supreme Court will permit (or require) states to allow religious charter schools.[18] Briefly, courts making a state-actor determination in litigation concerning charter schools will consider—in addition the public funding itself—the following: Whether the private entity is fulfilling (or even replacing) a function that has been understood as public, the legal designation of the private entity as public or non-public, the degree to which the private entity is being regulated by the state, and the nature of the contractual relationship between the state and the private entity.[19] Also, in the context of religious teaching, Saiger (2013) points to the core question of whether the specific agent (the charter-school teacher) is employed by or controlled by the state—with the answer generally being "no."[20]

Nationally, over 3.5 million students now attend charter schools, according to the sector's main advocacy organization.[21] This is almost 15 percent of all public school enrollment, and charters dominate enrollment options in some cities. In New Orleans, which now is run as an all-charter district, the church-state distinction would be eviscerated. In that district, as well as many others, students' anti-discrimination projections may devolve into a confusing patchwork, as described below.

Publicly Supported Discrimination

Many European nations have long subsidized churches and church schools. The so-called Founding Fathers of the U.S. were reacting against this establishment of subsidized churches common in Europe and that had emerged in some New World colonies. Today these policies are still in place in Europe and have led to controversies over whether such schools can discriminate or teach students discriminatory lessons if the basis for the discrimination arises out of religious beliefs.[22] Does, for example, teaching that members of another religion are condemned to hell, or that gay people are committing grave sins, or that women must obey their husbands, or even that certain kinds of foods are forbidden, amount to unlawful discrimination in institutions that are publicly subsidized?

Unrestrained by a Free Exercise Clause, England's anti-discrimination laws apply to its state-maintained religious schools. Pursuant to the British Equality Act, which covers England, Scotland and Wales, all schools receiving state funding subsidies "cannot unlawfully discriminate against pupils because of their sex, race, disability, religion or belief or sexual orientation."[23] In the U.S., charter schools are currently subject to similar anti-discrimination laws that prohibit discrimination based on most of these categories—although the laws in most states still do not include sexual orientation or gender identity.[24]

Absent free exercise considerations, there is no question that states (and the federal government) can require charter schools to comply with such anti-discrimination laws. In fact, pursuant to the Supreme Court's 1990 decision in *Employment Division v. Smith*,[25] the Free Exercise Clause does not prevent enforcement of a neutrally applicable law that only incidentally hinders a religious practice. Non-discrimination laws fit within that *Smith* framing; however, the *Smith* decision itself is now under attack.[26] Concurring opinions in the 2021 case of *Fulton v. City of Philadelphia*[27] document that at least five of the nine justices would like to modify or scrap the *Smith* holding—replacing it with a test that would weigh the state interest in not allowing religious exemptions against the degree of infringement on religious

practice and beliefs. The *Carson* case may be the vehicle for those five justices to pronounce that new test.

Given the current trends, the Court may create a post-*Smith* test that requires strict scrutiny for any state action that imposes a substantial burden on religious exercise. Importantly, this does not mean that states will lose every legal challenge.[28] A state's decision to require publicly funded schools—even private, religious schools—to comply with non-discrimination laws might very well be narrowly tailored to serve a compelling government interest: *Protecting children from having to endure discrimination at the hands of a program that the government itself funds*. Moreover, a religious interest in causing harm through discrimination is more problematic than an interest in engaging in an ostracized religious practice that does not directly injure others, such as the private consumption of peyote.

Maine's Anti-Discrimination Law

The two private religious schools in Maine that the plaintiffs in *Carson v. Makin* wanted to attend each stated a religious basis for policies that discriminate based on gender identity and sexual orientation. This discrimination would put the schools in violation of Maine's Human Rights Act, which guarantees the state's students the "opportunity . . . to participate in all educational" programs and "all extracurricular activities without discrimination because of sex, sexual orientation or gender identity, a physical or mental disability, ancestry, national origin, race, color or religion . . ." (Maine Statutes, Title 5, § 4601).

The laws creating voucher policies in many states already are written to allow discrimination.[29] But private schools participating in Maine's tuitioning program are specifically included within the coverage of the Human Rights Act. But the Act expressly exempts religious schools from the provision prohibiting discrimination based on sexual orientation or gender identity (§ 4602(5)(C)). That is, Maine's statutory structure separates religious private schools from secular private schools, with the latter being eligible to participate in tuitioning and the former being allowed to discriminate.[30] In this way, Maine's approach captures the tension and trade-off inherent in the First Amendment's religion clauses.

Taxes and Ministers

Even setting aside any direct government funding to support religious institutions, a variety of indirect benefits have challenged courts to decide whether those religious institutions can step over a line—whether the government can deny the benefit if the institution violates a public interest.[31] A 2006 analysis conducted by *The New York Times* reporters found literally hundreds of "special arrangements, protections or exemptions for religious groups or their adherents" in laws and court cases, "covering topics ranging from pensions to immigration to land use."[32] Yet it is the tax benefits that predominate here, as explained by Dylan Matthews in *The Washington Post*:

> When people donate to religious groups, it's tax-deductible. Churches don't pay property taxes on their land or buildings. When they buy stuff, they don't pay

> sales taxes. When they sell stuff at a profit, they don't pay capital gains tax. If they spend less than they take in, they don't pay corporate income taxes. Priests, ministers, rabbis and the like get "parsonage exemptions" that let them deduct mortgage payments, rent and other living expenses when they're doing their income taxes. They also are the only group allowed to opt out of Social Security taxes (and benefits).[33]

In *Bob Jones University v. United States* (1983),[34] the Supreme Court decided two cases: That of a university (Bob Jones University) and that of a private religious K-12 nonprofit (Goldsboro Christian Schools). In both cases, the federal Internal Revenue Service had determined that the schools did not qualify for nonprofit status because they had racially discriminatory policies. In the case of Goldsboro, the school acknowledged its racially discriminatory admissions policy but asserted that the policy was constitutionally protected because it was based upon an interpretation of the Bible. The Court rejected this argument, pointing to the government's "fundamental, overriding interest in eradicating racial discrimination in education":

> [T]he Free Exercise Clause provides substantial protection for lawful conduct grounded in religious belief. However, "[n]ot all burdens on religion are unconstitutional . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." On occasion this Court has found certain governmental interests so compelling as to allow even regulations prohibiting religiously based conduct . . . Denial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets. The governmental interest at stake here is compelling . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education – discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest; and no "less restrictive means," are available to achieve the governmental interest.[35]

The other relevant line of cases involves a "ministerial" exception to anti-discrimination laws as applied to key employees of religious institutions. (The name of the exception a misnomer, since the exception applies to many employees beyond ministers, including teachers.) Courts have given this exception (legally, it is an affirmative defense) to religious organizations because of a concern that allowing a government to interfere with the hiring and firing of key church employees gives that government too much influence over those churches. Relying primarily on the Free Exercise Clause, the Supreme Court has pronounced that federal employment anti-discrimination protections cannot be successfully used by those "holding certain important positions with churches and other religious institutions."[36] Those "certain important positions" are not specifically defined, but a key factor is whether the employee's job duties include "important religious functions."

Together, these two lines of cases—tax exemptions and the ministerial exception—paint a

cloudy picture of Supreme Court precedent concerning the discrimination line that schools cannot cross. The latter cases involve discrimination against employees, which does not implicate the same "overriding interest" cited by the Court in *Bob Jones*. But the *Bob Jones* case also is not completely on point, since losing a tax exemption is arguably less of a burden for a school than is being excluded from a voucher program. The case was also not technically an application of a civil rights or anti-discrimination law. And, as discussed in the next section, the Court is not likely to place discrimination based on sexual orientation or gender identity at that same ("overriding interest") level as racial discrimination.

Returning to Anti-Discrimination Laws and Free Exercise

In *Runyon v. McCrary* (1976),[37] the Supreme Court held that a key federal civil rights law (section 1981 of the Civil Rights Act of 1866) can be applied to prevent a private school from engaging in racial discrimination. But the defendants in that case did not mount a Free Exercise defense; the schools were not sectarian and did not claim that the racial discrimination arose out of a religious belief. Similarly, the Court in *Norwood v. Harrison* (1973)[38] found that a Mississippi law that offered textbook assistance to all schools, public and private, unconstitutionally provided this assistance to support discriminatory schools—but the private schools at issue were again nonsectarian.

A half-century later, comparable issues are emerging[39]—with two main differences. First, the schools' racial discrimination has been largely replaced with discrimination based on gender identity and sexual orientation. Second, the schools are church-affiliated and are now indeed asserting that the discrimination is grounded in religious beliefs. The first difference is important because civil rights laws and equal-protection jurisprudence have not yet caught up; statutory and constitutional protections for gender identity and sexual orientation are substantially weaker than against racial discrimination. The second difference is important because of the Supreme Court's recent inclination to elevate free exercise rights. The forthcoming *Carson v. Makin* decision may see the Court set forth a strict-scrutiny rule that pressures state programs to overlook such discrimination—to provide public financial support to private religious schools and ignore any religiously motivated discrimination focused on gender identity and sexual orientation.

Another Red-Blue Divide

Consider, then, the legal and political landscape if Justices Barrett and Kavanaugh (or Chief Justice Roberts and either Barrett or Kavanaugh) join with Justices Thomas, Alito and Gorsuch and decide in *Carson* to remove the *Espinoza* distinction between use and status. The Free Exercise Clause would require that taxpayer money be made available for religious uses, at least in government contracting contexts, whenever that funding is made available at all. The implication for charter school laws in particular is that charters must not just be available to religious entities, pursuant to *Espinoza*; these religious entities must be allowed to run the charters as religious schools. Further, a majority of the current justices have indicated that they want to replace the *Smith v. Employment Division* rule, which currently

allows enforcement of a neutrally applicable law that only incidentally hinders a religious practice, with something like a strict scrutiny test that would require such "hindering" laws (including non-discrimination laws) as applied to these religious charter schools to be narrowly tailored to serve a compelling government interest.

The most likely litigation scenario is the one embodied by the two private religious schools at issue in Maine, each of which cite religious reasons for policies that discriminate based on gender identity and sexual orientation.[40] Approximately 20 states (including Maine or Maryland) do have anti-discrimination laws that protect against such discrimination in schools.[41] These 20 states, with the exceptions of Vermont and North Dakota, all have charter school laws as well.

If the Supreme Court shifts free exercise jurisprudence in the above-described direction, we can expect that religious nonprofits will apply to establish charter schools. (Given the current state of the law, this is likely already moving forward.) These applications will likely set forth a curriculum consistent with their religious beliefs, including—in many cases—religious worship and proselytization. Some of these applications (or the charter schools' stated rules) will include curriculum, policies and practices that discriminate against students based on their, or their family's, gender identity or sexual orientation.

If the state refuses these charter applications because of the discrimination, we will see lawsuits from the applicants. If the state grants the applications, we may see lawsuits from aggrieved students (possibly with some questions about standing). Courts will then be asked to apply the new Supreme Court holding, presumably setting forth a strict scrutiny standard of review, to these controversies.

Would the state keep in place a charter school system if courts mandate that the system be utilized to fund discrimination?

If the applicants prevail, charter school laws will start to closely resemble laws creating private-school vouchers. For states like California, which has 20 percent of the nation's total charter school enrollment but has repeatedly rejected private-school voucher proposals, this would present a dilemma. California anti-discrimination law protects LGBTQ students, covering both sexual orientation and gender identity. It also has LGBTQ-inclusive state curricular standards. Would the state keep in place a charter school system if courts mandate that the system be utilized to fund discrimination?

Most likely, political support for charter schools would collapse among the state's Democratic majority. In fact, following from the hypothesized legal outcomes, such blue-state policymakers would likely feel compelled to move most or all discretionary educational services in-house—to be provided directly by government employees. That is, these states may repeal their charter-school laws. Alternatively, states may restore the caps on charter expansion that were lifted by states in 2009-2010 under the pressure of the Race to the Top incentives.[42] The charter sector could maintain its current footprint in states with tight caps, but expansion—and therefore concerns about discrimination and proselytizing with taxpayer dollars—would be limited. New charter schools might, for example, open only to replace those that fail or are closed.

In contrast to these possible blue-state responses, many red-state policymakers can be expected to embrace the prospect of churches having equal access to government contracts and interjecting religious teachings while carrying out contracted work. Further, the new legal regime could, in these red states, become a red carpet for those with a motivation to discriminate. This discrimination may go beyond hiring or student admission; in some cases bigotry would be part of the curriculum and counseling programs. And it may target, for instance, disfavored religious groups in addition to LGBTQ+ community members.

The linchpin of this nightmare scenario for states' anti-discrimination interests is the exact nature of a post-*Smith* rule. What standard will courts use to weigh the state interest in not allowing religious exemptions against the degree of infringement on religious practice and beliefs? It would not be surprising to find unconcerned politicians who look at the current situation and see the church "dog" wagging the discrimination tail. These politicians would conclude that religiously motivated discrimination is not that common, that any discrimination is likely limited to targeting the LGBTQ+ community, and, anyway, a family can easily avoid discrimination in a choice context. But even setting aside the bigoted nature of such a dismissal of the harm done by these church-run schools, the argument misses two key problems. First, parents generally make school choices that subject their children to LGBTQ+ bigotry without those children having opted in.[43] Second, changing free-exercise jurisprudence in this way may result in the discrimination dog wagging the church tail—resulting in more widespread instances of discriminatory schools. That is, bigots can embrace church status in order to get legal protection. In addition to the earlier-discussed tax benefits, religious status could bring an entitlement to implement biased teachings around everything from gender roles and pregnancy to disabilities and race.

While most White Nationalist groups do not currently purport to be a religion, some do.[44] Although the IRS may reject these "churches" for various other reasons (such as engaging in partisan political activity), the groups' belief structure is off-bounds. In *Universal Life Church v. United States* (1974),[45] the court reasoned that it is not generally appropriate for the government to question the validity of a church's religious beliefs. Given the Christian Identity (neo-Nazi) movement, it is not difficult to conjure up scenarios that would put courts—and charter-supporting politicians—in a difficult bind. Even existing voucher policies that require non-discrimination in participating schools would come under scrutiny if the Supreme Court gave heightened free exercise protection to any practices arising from religious beliefs.

A rule that effectively acts as a religious exemption from anti-discrimination laws would be a poison pill for school choice in blue states, and for charter schools in particular.

A rule that effectively acts as a religious exemption from anti-discrimination laws would be a poison pill for school choice in blue states, and for charter schools in particular. If school-policy political positions could be roughly divided, we would see a right-wing position favoring privatization and freedom to discriminate, a neoliberal position favoring privatization along with some anti-discrimination protections, and a progressive position against privatization and favoring anti-discrimination protections. The alliance between the first two—seen with charter schools and sometimes with vouchers—will break down if the Supreme Court goes too far. This is likely why the president of the National Alliance for Public Charter Schools

has insisted religious charter schools will never become reality.[46]

Complicating the Blue-State Response

The Equal Protection Clause and the Free Exercise Clause prohibit religiously motivated discrimination. With that in mind, consider again the California situation. If the legislature repeals its charter school law, the reasoning would likely be, *We are changing our law in order to avoid the implications of the Supreme Court's* Carson *decision, whereby we would have to expand our charter school system to include schools that teach religion to inculcate religious beliefs and that justify discrimination based on those beliefs*. This rationale seeks to avoid state support for religious proselytizing and taxpayer support for schools that engage in religiously motivated discrimination.

Yet, assuming the Supreme Court has disposed of the status-use distinction, it may characterize such a legislative decision as itself discriminatory and therefore unconstitutional. The argument here is that the action of repealing the law would be motivated by an intent to discriminate against these religious beliefs. Those beliefs may indeed be intertwined with proselytizing and discrimination, but that's the conundrum. A court may simply conflate the goal of avoiding state support of proselytizing, or the legislature's objection to a church's discrimination, with anti-religious animus. Moreover, there is likely to be an advocate or California legislator who does in fact utter some anti-religious statements as part of the debate.

Accordingly, it would not be shocking to see the repeal itself swallowed by the Supreme Court's new free exercise leviathan. A state could not pull back its charter law if the intent is to deny religious institutions an equal piece of the pie, and it would not the first time the Court has revived a dead law for such a reason.[47]

Conclusion

The Supreme Court's now-dominant majority of justices with very conservative politics seems to have abandoned the relatively incrementalist (but still very conservative) agenda of Chief Justice Roberts. This brazenness is apparent from the leaked draft of Justice Alito's majority opinion in *Dobbs v. Jackson Women's Health Organization*, overturning *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992). The *Carson v. Makin* decision may or may not be equally bold, but this Court's direction is clear. Religious believers' claims of discrimination now have a preferred place in the federal courts. Other discrimination claims, particularly those on behalf of members of the LGBTQ+ community, are shown a back seat along with claims raising concerns about the establishment of religion.

Riding the wake of these changes, private-school voucher policies have gained legal advantages that were, just decades ago, unimaginable pipedreams. But this may create very real political problems—in blue states at least—for charter school advocates. Of course, the Supreme Court's majority may, in *Carson* or in later cases, attempt to carve out exceptions for charter schools and other types of contracting for governmental services. Perhaps a

school system's possible sectarian charter schools run by religious institutions can occupy a different legal place than Vermont's sectarian private schools within its school system. Or perhaps the application of a state's anti-discrimination laws will survive strict scrutiny even if it means that a sectarian charter school has to curtail its religiously motivated discriminatory practices. The one sure thing is that we now have a Supreme Court that is unabashedly transforming the legal rules within which other governmental entities must make their rules—and education policymakers will have to respond accordingly.

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10 Carson v. Makin (2022). U.S Supreme Court, Docket 20–1088, decision pending. Cert. granted July 2, 2021.

11 Other protected groups could also be targeted by church-run charter schools, including disfavored religious groups and non-native English speakers. The possibility of racial discrimination is also discussed later in this policy memo. I focus in particular on discrimination based on gender identity and sexual orientation because the issues are cleanly and clearly framed by the potential shift in the law.

12 Locke v. Davey, 540 U.S. 712, 718 (2004).

13 While conventional voucher policies are funded through tax revenues taken in by the state and then disbursed through the vouchers, neo-voucher policies are funded through donations to private non-profits, which bundle the donations and disburse them through vouchers. The state backfills those donations through tax credits. In fact, in some states the tax credit is for 100% of the donation. See Welner, K.G. (2008). *NeoVouchers: The emergence of tuition tax credits for private schooling*. New York: Rowman & Littlefield.

14 Espinoza v. Montana Department of Revenue, 591 U.S. ___; 140 S. Ct. 2246, 2257 (2020).

15 See discussion in Saiger, A.J. (2013). Charter schools, the establishment clause, and the neoliberal turn in public education. *Cardozo Law Review*, *34*, 1163-1225.

16 Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

17 Green III, P.C., Mead, J.F., & Eckes, S.E. (2020). Covenants to discriminate: How the anti-LGBT policies of participating voucher schools might violate the state action doctrine. *University of New Hampshire Law Re-*

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18 Black, D.W. (2021). NEPC review: "Religious charter schools: Legally permissible? constitutionally required?" Boulder, CO: National Education Policy Center. Retrieved May 9, 2022, from http://nepc.colorado.edu/think-tank/religious-charters

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See also Justice Breyer's dissent in *Espinoza v. Montana Department of Revenue*, 591 U.S. ___; 140 S. Ct. 2246, 2291 (2020).

19 See Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

20 Saiger, A.J. (2013). Charter schools, the establishment clause, and the neoliberal turn in public education. *Cardozo Law Review*, *34*, 1163-1225.

There are exceptions, however, including the "Instrumentality" charter schools in Wisconsin. See Wisconsin Department of Public Instruction (2019). *Statutory report series, legislative report on charter schools 2017-2018*. Retrieved May 9, 2022, from https://docs.legis.wisconsin.gov/misc/mandatedreports/2019/department_of_public_instruction/2015_16_2016_17_and_2017_18_charter_school_reports_s_115_48_2_received_10_22_2019.pdf

21 Veney, D., & Jacobs, D. (2021). Voting with their feet: A state-level analysis of public charter school and district public school trends. *National Alliance for Public Charter Schools*. Retrieved May 9, 2022, from https://files.eric.ed.gov/fulltext/ED616048.pdf

22 Milton, J. (2020, November 17). Dutch lawmakers set to ban religious schools from refusing LGBT+ students and families for no other reason other than hate. *Pink News*. Retrieved May 9, 2022, from https://www.pinknews.co.uk/2020/11/17/netherlands-dutch-religious-schools-article-23-lgbt-gay/

See also the discussion in Walford, G. (2001). Funding for religious schools in England and the Netherlands: Can the piper call the tune? *Research Papers in Education*, *16*, 359-380.

23 Equality Act [U.K.] (2010). Retrieved May 9, 2022, from https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/315587/Equality_Act_Advice_Final.pdf (p. 5).

24 Movement Advancement Project (nd). *Safe school laws: School nondiscrimination*. Retrieved May 9, 2022,

from https://www.lgbtmap.org/equality-maps/safe_school_laws/discrimination

Religious schools would likely also be "exempt" from the application of federal protections against LGBTQ+ discrimination, notwithstanding Bostock v. Clayton County, 590 U.S. ____; 140 S. Ct. 1731 (2020). Although *Bostock* found that protections against sex discrimination in employment included sexual orientation, the Court did not consider the issue in the context of the Free Exercise Clause. The Court's decision in Our Lady of Guadalupe School v. Agnes Morrissey-Berru, 591 U.S. ____; 140 S. Ct. 2049 (2020), decided soon after *Bostock*, did consider the Free Exercise Clause in the context of an age discrimination case. The Court applied the so-called "ministerial" exception—even though the employment decision was not based on religious beliefs or practices.

25 Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

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27 Fulton v. City of Philadelphia, 593 U.S. ____; 141 S. Ct. 1868 (2021).

28 Winkler, A. (2006). Fatal in theory and strict in fact: An empirical analysis of strict scrutiny in the federal courts. *Vanderbilt Law Review*, *59*, 793.

29 Eckes, S.E., Mead, J., & Ulm, J. (2016). Dollars to discriminate: The (un) intended consequences of school vouchers. *Peabody Journal of Education*, *91*(4), 537-558.

30 McCartney, B.E. (2020). A case against school choice: Carson Ex Rel. OC v. Makin and the future of Maine's nonsectarian requirement. *Maine Law Review*, *73*, 313.

31 Warnick, A.C. (2008). Accommodating discrimination. *University of Cincinnati Law Review*, *77*, 119-180.

32 Henriques, D.B. (2006, October 8). As exemptions grow, religion outweighs regulation. *New York Times*, at A1.

33 Matthews, D. (2013, August 22). You give religions more than $82.5 billion a year. *Washington Post*. Retrieved May 9, 2022, from https://www.washingtonpost.com/news/wonk/wp/2013/08/22/you-give-religions-more-than-82-5-billion-a-year/

34 Bob Jones University v. United States, 461 US 574 (1983).

35 Bob Jones University v. United States, 461 US 574, 603-604 (1983). Internal citations, paragraph formatting, and footnotes omitted.

36 Our Lady of Guadalupe School v. Agnes Morrissey-Berru, 591 U.S. ____; 140 S. Ct. 2049 (2020).

37 Runyon v. McCrary, 427 U.S. 160 (1976).

38 Norwood v. Harrison, 413 U.S. 455 (1973).

39 Mirkay, N.A. (2008). Losing our religion: Reevaluating the Section 501(c)(3) exemption of religious organization that discriminate. *William & Mary Bill of Rights Journal*, *17*, 715-764.

40 See also Bethel Ministries, Inc. v. Salmon, 2022 WL 111164 (D. Md., 2022), involving a similar private religious school that seeks to receive voucher funding in Maryland.

41 Movement Advancement Project (nd). *Safe school laws: School nondiscrimination*. Retrieved May 9, 2022, from https://www.lgbtmap.org/equality-maps/safe_school_laws/discrimination

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45 Universal Life Church v. United States, 372 F. Supp. 770 (E.D. Cal. 1974). The IRS has cracked down on the use of Universal Life Church ordination as a tax dodge, however.

46 Barnum, M. (2022, February 24). *'The next frontier': Supreme Court case could open door to religious charter schools*. Chalkbeat. Retrieved May 9, 2022, from https://www.chalkbeat.org/2022/2/24/22949483/supreme-court-maine-carson-makin-religious-charter-schools

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